

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**FEBRUARY 10, 1998**

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-2663-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JOHN P. KRUEGER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Oneida County:  
ROBERT E. KINNEY, Judge. *Reversed and cause remanded for further proceedings.*

CANE, P.J. The issue in this case is whether the trial court has authority to dismiss with prejudice a criminal complaint before jeopardy has attached under Wisconsin's due process clause, absent proof of a misuse of prosecutorial discretion. The facts are straightforward and undisputed.

Initially, the State charged John Krueger with publicly and indecently exposing his genitals, contrary to § 944.20(2), STATS., along with two

other charges not relevant to this appeal. At the jury trial, the court admitted another alleged act of Krueger exposing his genitals as other acts evidence over Krueger's objections. However, when admitting the other acts evidence, the trial court cautioned the prosecution that by admitting this evidence it would not permit the State to later charge Krueger with this offense if it lost. It reasoned that by using the incident as other acts evidence, the State was electing to abandon charging Krueger with the other act. It also reasoned that it would be a violation of due process or constitutional fairness for the State to lose the case and then later charge him separately with the other act. The matter proceeded to trial and the jury found Krueger not guilty of all the charges.

Almost a year later, the State filed a new criminal complaint charging Krueger with disorderly conduct and lewd and lascivious behavior, relying on the same facts constituting the other acts evidence at the earlier trial. In response to Krueger's motion to dismiss the complaint, the trial court recalled its earlier admonishment to the State and dismissed the charge with prejudice on the basis that this second charge violated due process and constitutional fairness. The trial court did not suggest, nor did Krueger argue, that double jeopardy bars this charge.

The State appeals, contending the trial court has no authority to dismiss the criminal complaint with prejudice before jeopardy has attached, absent proof of misuse of prosecutorial discretion. The State relies on *State v. Braunsdorf*, 98 Wis.2d 569, 297 N.W.2d 808 (1980) as dispositive of this issue.

In *Braunsdorf*, without the trial court's knowledge or permission, the prosecutor unilaterally directed the clerk of court to cancel a jury for the defendant's scheduled trial. After calling the case for trial and upon learning of the prosecutor's act, the trial court granted the defendant's motion to dismiss the case

with prejudice, concluding it had authority for reasons of public policy and economy of judicial resources.

Acknowledging that it has sanctioned dismissal for want of prosecution in civil cases under the trial court's inherent authority, the supreme court recognized that a dismissal in a criminal case has much broader implications for society as a whole, especially where a defendant's constitutional rights are not implicated. *Id.* at 585-86, 297 N.W.2d at 816. It then reasoned that the trial court's power to dismiss a criminal complaint with prejudice before attachment of jeopardy, regardless of how judiciously it is used by the trial courts, is too great an intrusion into the realm of prosecutorial discretion. *Id.* at 586, 297 N.W.2d at 816. Accordingly, it held that trial courts do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial. *Id.* Krueger cites the dissent in *Braunsdorf* in support of the trial court's decision in this case. While persuasive, the dissent remains exactly that, a dissent.

Here, Krueger does not claim his constitutional right to a speedy trial was violated. Nor did he present any evidence of prosecutorial misconduct. Accordingly, this court has no alternative but to reverse the trial court's dismissal of the criminal case. This holding, however, does not mean that this court approves of the State's decision to prosecute this case. As the trial court reasoned, the State is attempting to get another chance to convict Krueger based on the same evidence used as other acts evidence in the earlier trial which resulted in a jury's not guilty verdict. Although double jeopardy is not argued as a basis for dismissal (possibly for good reasons), this court is sympathetic to the trial court's dilemma. However, the trial court's comments at the initial trial when admitting the other acts evidence cannot be a basis for now dismissing the charge. The trial court's decision then was either to admit or deny the other acts evidence based on the merits at the time and under appropriate authority. None of that authority allows

the trial court to admit the evidence on a condition which prohibits the State from later exercising its prosecutorial discretion.

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

